United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18,243 and 18,244

TOMMIE A. JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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LEON STEWART,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from Judgment of Conviction of
Robbery in Violation of § 22-2901
District of Columbia Code

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STATEMENT OF QUESTIONS PRESENTED

1. Did the Court err in denying appellants' motion to suppress evidence seized from their persons following an unlawful arrest?

2. Did the Court err in permitting detective Blancato to testify in rebuttal as to alleged post-arrest statements made to him by appellant Johnson when imprisoned for nineteen days without benefit of counsel?

3. Was the Court's charge to the jury on credibility prejudicial to the rights of the appellants to a fair and impartial trial?

4. On the whole of the testimony was there sufficient credible evidence that a reasonable mind could believe the appellants guilty of the crime as charged?

TOMMIE A. JOHNSON,

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JURISDICTIONAL STATEMENT

This is an appeal from judgments of conviction, following verdicts of guilty, of robbery in violation of § 22-2901, D. C. Code (1961). The United States District Court for the District of Columbia had jurisdiction under §§ 11-305 and 11-306, D. C. Code (1961).

The judgments of conviction were entered on October 10, 1963, and appellant Johnson was then sentenced to imprisonment for a period of two to ten years and appellant Stewart for a period of four to fifteen years. Leave to proceed on appeal without prepayment of costs was properly granted.

This Court has jurisdiction of the appeal pursuant to 28 U.S.C. §§ 1291 and 1915.

STATEMENT OF THE CASE

In Criminal Action 529-63 the appellants were tried on a single indictment charging them with robbery in violation of § 22-2901 of the District of Columbia Code in that they robbed one Howard M. Rosenberg of property "of the value of about $102.00, consisting of the following: $80.00 in money, one gold certificate of the value of twenty dollars, one ball-point pen of the value of $1.00 and one knife corkscrew of the value of $1.00." Both defendants were found guilty and were sentenced to imprisonment.

The evidence given at the trial by the complaining witness and appellant Johnson* is at variance and will be separately summarized.

Howard M. Rosenberg

The testimony of the complaining witness Howard M. Rosenberg was in pertinent part substantially as follows:

On the night of May 6, 1963, he was driving his car toward his home following attendance of a meeting of coin collectors at the Smithsonian Institute; that shortly after 10:30 that evening in the vicinity of the 1100 or 1200 block of 11th Street** the appellants, attired as women, "waved, and more or less flagged me down." (Tr. 48-51). Appellant Johnson asked if he, Rosenberg, was "sporting" (Tr. 52) and after some conversation Rosenberg picked up the appellants for the purpose of indulging in sexual intercourse with at least one of them. (Tr. 52, 76-77). He then drove the appellants in his car from the point of the pickup to his office at 3736 Tenth Street, N.E., having made a stop at a gas station*** on the way to acquire some "chasers" for

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*Appellant Stewart did not testify.

**There is some confusion in the record (Tr. 92, 180) as to whether it was 11th Street or 14th Street, but it is not a material fact in the case.

***The gas station was not open for business. (Tr. 79).

the liquor they apparently proposed to consume at his office. (Tr. 52-3). On the way to his office, he realized he had "made an error in judgment" and wished to get rid of the appellants "because of the manner in which they were talking." (Tr. 53). He did not discover appellants were men until the following morning when he saw them at police headquarters. (Tr. 53, 75). After the three of them entered his office, appellants wanted something to drink and he gave them some bourbon whiskey (Tr. 82), after which he offered them each $5 and asked them to leave. (Tr. 54). At that point the appellants became infuriated, beat him up, went through his pockets and took "everything that I had in my pockets." (Tr. 54) Appellants then left and he called the police. (Tr. 54-5). He "fabricated a story" for the police to the effect that the two appellants and a third individual (presumably a male) forcibly came into his office, beat him up and robbed him. (Tr. 59-60). The next morning, May 7, 1963, at approximately ten o'clock he was called to police headquarters where he identified the appellants and repeated the fabricated story of the night before "at which time the girls became very demonstrative and there was a lady secretary in the office and they became quite uncouth, and at that time they removed these two people. And then I said to the detective: Detective, I have to tell you the whole story on this. At

which time I did tell him why I had fabricated the story, in order to cover myself, and keep these people from doing these things in the future." (Tr. 91).

Tommie A. Johnson

The testimony of appellant Johnson was substantially the same* as that of the complaining witness as to the events surrounding the pickup, the trip to Rosenberg's office including the stop at the gas station to get soft drinks as "chasers", and the partaking by appellant Johnson of a drink of bourbon whiskey soon after arriving in Rosenberg's office. Contrary to the testimony of Rosenberg(Tr. 51, 75), appellant Johnson testified he had previously met Rosenberg at the Ebony Grill when he Johnson was working as a strip-tease dancer. (Tr. 179).

The testimony of appellant Johnson as to the subsequent events does not lend itself to paraphrase and is, therefore, quoted:

> "Q Following the drinking, tell the Court and the jury what happened.
>
> "A Well, after we had a drink, it was a canvas type of material that a painter might use. Well, he spread that on the floor because naturally there wouldn't be a bed in the office. And he laid on the floor and naturally I asked him for my ten dollars. And he gave me my ten dollars. And after he gave me my ten dollars, Stewart laid down and I lay down. I laid down, my feet on the tiles because I had on shoes. Stewart had on two-piece suit. It was hard

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*Johnson testified that Rosenberg agreed to pay each of the appellants $10 for their services, whereas Rosenberg testified he had agreed to pay $5, and only to Johnson. (Tr. 182,78).

to get out of mine. So I laid down and he laid in the middle of us and had, I guess you might call an oral -- I don't know what you might call it.

"Q An unnatural sex act, would you say?

"A That is right. And then he wanted to keep going, so I asked him for more money, for ten dollars more. And he gave -- he went to his car, and got a twenty-dollar bill, and came back and gave me the twenty and I transferred my ten to Stewart to make him have twenty and I had twenty dollars.

"Q And then what happened?

"A And then we went a little further. And he wanted me to oral him. That is when disturbance came in.

"Q What disturbance came in?

"A I told him if he had some money I might could do that.

"Q Did he offer you any more money?

"A No; he said he didn't have any more.

"Q What was the result?

"A I told him if he didn't have no more, he couldn't get no more.

"Q We have been through that. Did you then seek to leave or did he seek to leave, or tell us what happened after these acts had been completed.

"A I got up and put my shoes on. And got my pocketbook and got ready to leave and Stewart was in front of me and he grabbed me by my left arm.

"Q Who grabbed you?

"A Mr. Rosenthorn.

"Q Rosenberg.

"A Mr. Rosenberg. He grabbed me by my arm. And when he grabbed me by my arm, I relieved my arm with my right hand.

"Q All right. And then what happened?

"A And then, when I relieved my arm, I hit him.

"Q What did you hit him with and where?

"A I hit him with my fist.

"Q Where did you hit him?

"A In his face.

"Q Then what happened?

"A I hit him in his face, he let me go and I was on my way out, he grabbed Stewart and Stewart had a split in his blouse and with his suit, in the back. And Stewart slapped him.

"Q Was there any fighting or striking except for that?

"A That is all."

Appellant Johnson then identified the twenty dollar gold certificate described in the indictment (Government's Exhibit 3) as the twenty dollar bill which Rosenberg gave to him. (Tr. 187). He also identified the ballpoint pen described in the indictment (Government's Exhibit 2-B) as one which Rosenberg handed to appellant Stewart to write down Rosenberg's phone number, and the knife corkscrew described in the indictment (Government's Exhibit 2-A) as "the bottle opener that opened the coke." (Tr. 187-8).

The Arrest of Appellants and the Post-Arrest Statement of Appellant Johnson

At trial, objections were duly made to the Court's denial of defendants' motion to suppress evidence, and to the introduction of a post-arrest confession made by Johnson in jail without benefit of counsel to a police officer. The necessary facts supporting appellants' arguments that the Court erred in these matters are set forth in Points I and II of the Argument, and need not be separately stated here.

STATUTE INVOLVED

Section 22-2901, D.C. Code (1961) provides:

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 810.)"

STATEMENT OF POINTS

1. The Court erred in denying defendants' motion to suppress evidence seized from their persons following an unlawful arrest.

2. The Court erred in permitting detective Blancato to testify in rebuttal as to alleged post-arrest statements made to him by appellant Johnson when imprisoned for nineteen days without benefit of counsel.

3. There was plain error, prejudicial to the rights of appellants to a fair and impartial trial, in the Court's charge to the jury on credibility.

4. On the whole of the testimony there was insufficient credible evidence for a reasonable mind to believe the appellants guilty of the crime as charged.

SUMMARY OF ARGUMENT

1. The principal physical evidence on which appellants were convicted of the crime of robbery was obtained by unlawful search of their persons. In order for such evidence to have been properly admissible, it must have been obtained pursuant to a valid search warrant or as an incident to a lawful arrest. The record is clear that there was no warrant for search of the appellants' persons. Nor can the search be claimed to have been an incident to a valid arrest.

The appellants were under arrest at the time they were asked by the police to leave the restaurant and were escorted out of the restaurant by the police. At that time appellants were neither suspected of a felony nor committing a misdemeanor in the presence of the arresting officers. Since there was no probable cause at the time of the arrest, the arrest was invalid and evidence obtained as a result thereof was inadmissible. The motion to suppress should have been granted.

2. The record shows that detective Blancato was permitted, over objection, to testify to the details of a confession allegedly made to him by appellant Johnson nineteen days after his initial appearance before the Commissioner, and before he had benefit of counsel. The admission of detective Blancato's testimony in that regard has all the vices of the admission of the confessions in the Mallory-McNabb cases. These were not cured by the Court's attempted limitation as to the purpose for which the testimony was received.

3. The instruction of the Court below to the jury as to the credibility of the complaining witness stated flatly that he could have avoided appearing in the courtroom and thereby spared himself and his family the shame and anguish resulting from his willingness to testify as to his own misconduct on the night in question. That portion of the instruction imputed a nobility of purpose to the testimony

of an acknowledged liar who conceivably may have testified in order to avoid being a defendant himself on a charge of sodomy — a result worse than the shame and anguish occasioned by his appearing as a witness. Immediately following that instruction the Court, in discussing the testimony of appellant Johnson, stressed that Johnson had something to gain by not telling the truth. The portion of the charge with respect to the credibility of the complaining witness taken alone and particularly when coupled with the succeeding portion of the charge with respect to the credibility of appellant Johnson could not help but have created an incurable prejudice in the minds of the jury that the Court believed the complaining witness and disbelieved Johnson.

4. This Court has made clear that a conviction cannot be sustained unless, upon the whole of the evidence, a reasonable man could find the defendants guilty of the crime as charged rather than being in balance between guilt and innocence. On the basis of the inherent incredibility of the evidence of the complaining witness, his admission of having told different stories to the police about the alleged crime and the circumstances of the case as revealed by the record as a whole, the District Court should have granted the motion for acquittal at the close of the Government's case. Alternatively, the Court should have directed a verdict for the defendants at the close of the evidence.

ARGUMENT

I. The Court erred in denying appellants' motion to suppress evidence seized from their persons following an unlawful arrest.

The Court below erred in denying defendants' motion to suppress evidence. (Tr. 23-24). There was no warrant for their search, and the search therefore may only be sustained on the claim that it was incident to a valid arrest. See United States v. Jeffers, 342 U.S. 48, 51 (1951). The defendants were arrested illegally and, consequently, evidence obtained as a result of that arrest was inadmissible at the trial.

Appellants' argument on this point is based on two premises, each of which is fully supported by the record: (1) that the appellants were under arrest at the time they were asked by the police to leave the restaurant and were led out of the crowded restaurant with policemen leading and following them (Tr. 19); (2) that there was no probable cause for the arrest at that time, and that the arrest without warrant was therefore unlawful and the evidence thereafter obtained inadmissible.

Officer Neary testified that he and officer McAlister went to the Executive Lunch as the result of a phone call

made by the restaurant owner. (Tr. 6). They walked in the restaurant, and met the owner, who pointed to the appellants. The appellants were seated at a table (Tr. 7), were not bothering anyone, and did not cause any trouble in the officers' presence. (Tr. 18). The policemen apparently asked them to leave solely because the owner "wanted them to leave." (Tr. 18). The appellants were not even asked by the owner in the presence of the officers to leave the restaurant. (Tr. 22). However, the policemen got them up from the table, officer Neary led the way, the appellants and a companion followed, and officer McAlister brought up the rear. (Tr. 19). Not until they were out on the street, "on the corner," did the officers examine them more closely and reach the decision that they fit the description of the "lookout" that had been read to the officers earlier that morning. (Tr. 16).

(1) This Court has recently found that the following charge to a jury accurately expresses the law of when a person is under arrest:

> "You are instructed that an arrest is the restraint of the right of locomotion, or a restraint of the person. It may be made without force or without touching the body. It is sufficient if the party arrested is within the power of the officer and submits to arrest, even as a result of a verbal command.
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> * * *
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> "It is sufficient if the person arrested understands that he is in the power of the one arresting, and submits in consequence." Coleman v. United States, 111 U.S. App. D.C. 210, 218, 295 F.2d 555, 563 (1961), cert. denied, 369 U.S. 813 (1962).

There can be no doubt in this case that the defendants thought themselves to be acting subject to the command of the officers. Any reasonable man seated at a restaurant table, having two uniformed policemen come over, and being led out of the restaurant by them at their command, would scarcely consider himself to be acting on his own volition. The situation is strikingly similar to that of Kelley v. United States, 111 U.S. App. D.C. 396, 298 F.2d 310 (1961).

In Kelley, police officers entered a restaurant where the appellant was seated at a counter. They asked the appellant to come outside where they wanted to talk to him. It was argued by the government that the arrest did not take place at that moment, but that it took place later outside the restaurant after the police had reason to believe that Kelley had committed a felony. The Court answered:

> "That the appellant was restrained of his liberty and so understood can hardly be doubted as he left the restaurant with one officer leading the way and the other either alongside or behind the appellant." 111 U.S. App. D.C. at 398, 298 F.2d at 312. (Emphasis added)

The Court found that there was no probable cause for the arrest, and reversed the conviction because a motion to suppress evidence taken as a result of the arrest had been denied.

(2) There having been an arrest at the time the defendants were asked to leave and were led out of the

restaurant by the uniformed officers, it seems clear that there was no probable cause for such arrest at that time. Traditionally — and constitutionally — an arrest without warrant can only be made on suspicion of a felony, or on the commission of a crime in the presence of the arresting officer. See, e.g. Henry v. United States, 361 U.S. 98 (1959). Officer Neary made quite clear that he and officer McAlister did not connect the defendants with the lookout description until after they had led defendants outside to the corner. The lookout description played no part whatsoever in the officers' action in taking the defendants out of the restaurant.

What crimes were the defendants committing? To anticipate the government's response, the only possible claim could be that they were making an unlawful entry on property, as described in D.C. Code § 22-3102:

> "Any person who, without lawful authority, shall enter, or attempt to enter, any public or private dwelling, building or other property, or part of such dwelling, building or other property, against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $100 or imprisonment in the jail for not more than six months, or both, in the discretion of the court."

Surely the defendants entered the Executive Lunch with lawful authority, since the owner held out to the public his services. The only possible crime is that being on the property, they refused "to quit the same on the demand of the lawful occupant." But the record is clear that there was no demand by the owner in the presence of the officers. Thus, no misdemeanor was committed in their presence:

> "Q Just a few more questions, Officer. While you were there, were these two defendants instructed to leave the restaurant?
>
> "A By who? The owner?
>
> "Q By the owner.
>
> "A No, sir." (Tr. 22).

It is clear that there was no probable cause for the arrest when made inside the restaurant. The Supreme Court has made clear that the government may not by bootstrap reasoning argue that the defendants' peaceable submission to the unlawful arrest itself constitutes probable cause-- "Probable cause cannot be found from submissiveness." United States v. De Re, 332 U.S. 581, 595 (1948). The arrest being unlawful, "nothing that happened thereafter could make that arrest lawful, or justify a search as its incident." Rios v. United States, 364 U.S. 253, 261-262 (1960).

The introduction at trial of evidence taken from the defendants was critical to their conviction and highly prejudicial. The failure to grant the motion to suppress warrants reversal of that conviction.

II. The Court erred in permitting detective Blancato to testify in rebuttal as to alleged post-arrest statements made to him by appellant Johnson when imprisoned for nineteen days without benefit of counsel.

After defendant Johnson had completed his testimony, the government sought to cross-examine him in order to "bring out admissions" he had made to detective Blancato while in custody on May 26 -- nineteen days after he had been taken before a committing magistrate. (Tr. 208). The purported admissions were no more and no less than a confession of guilt to the crime as charged. The Court permitted cross-examination based on this confession of guilt on the ground that the police had full right to interrogate after the initial appearance before the Commissioner and the attendant "judicial warning," even though the defendant had been in jail for nineteen days and had not been provided counsel. (Tr. 208-209). After defendant Johnson had denied making the alleged admissions to detective Blancato, the detective was allowed to testify, in spite of vigorous objections, and to give a full statement of his version of Johnson's alleged confession.

The Judge apparently justified officer Blancato's testimony on the ground that it was introduced "for the

limited purpose of impeachment." (Tr. 226). The jury was subsequently instructed that detective Blancato's testimony "is not before you now as evidence that the defendants or either of them committed the acts which are charged in the indictment, but only for the purpose of showing . . . that . . . the defendant Johnson made a statement to officer Blancato which is inconsistent with what the defendant Johnson himself said to you from the witness stand on critical issues of this case." (Tr. 236). The Judge further instructed the jury:

> "You should not consider the statements which were attributed by Detective Blancato to the witness Johnson as evidence relating to the alleged crime itself, but only as bearing on the credibility of the defendant Johnson as a witness." (Tr. 237).

The Judge's "limitation" on the use of detective Blancato's testimony is obviously illusory. The jury was allowed to hear testimony that the defendant had admitted his guilt. If the confession was inadmissible if presented by the government as part of its case, then it similarly must be inadmissible when used to dispute the defendant's version of the facts of the alleged crime. It is an overgeneralization of the law to state that ordinarily prohibited Mallory confessions are always admissible for purposes of impeachment, as seems to be suggested by the Court's statement to counsel at Tr. p.209. An illegally

obtained statement may be used to impeach a defendant's testimony concerning "sweeping claims" denying involvement in prior illegal activities. Walder v. United States, 347 U.S. 62 (1954). Similarly admissible is an illegally obtained statement involving "lawful activities" not bearing on guilt or innocence. Tate v. United States, 109 U.S. App. D.C. 13, 283 F.2d 377 (1960). In contrast to the situation in Tate, the use of detective Blancato's statement here directly challenged the innocence of the defendants. In Tate, this Court justified the use of the illegally obtained statement by concluding that "the statement on rebuttal was not inherently more incriminatory than the statement on direct" -- a conclusion completely inapposite to the present facts. The statement admitted here was an out and out confession of the crime with which appellants were charged.

Thus, the issue squarely put before this Court is whether the government was justified in introducing into evidence a statement made by the defendant when interrogated by the police nineteen days after being taken before the committing magistrate, while in custody in the D. C. Jail awaiting indictment. If the defendant were a man of means, he would undoubtedly have been free on bail, and thus, for all practical purposes, immune from subsequent police interrogation. If the defendant were a man of means, he would

undoubtedly have hired counsel who would have advised him during this nineteen-day period, and cautioned him not to make incriminating statements to the police, or not even to agree to talk to the police. But because defendant was an indigent, he remained in jail three weeks without having been indicted, in the custody of the police, without the benefit of counsel, and without any reminder other than his initial judicial warning* that he need not answer questions put to him by the police.

A recent landmark case decided by the Court of Appeals for the Fifth Circuit has direct bearing on this point. In Lee v. United States, 322 F.2d 770 (5th Cir. 1963), two government agents interrogated a defendant indicted for conspiracy to import heroin while he was in jail awaiting trial. As in the present case, the alleged statement was not reduced to writing, but was described in narrative form by one of the agents at the trial. The Court, in a lengthy opinion exhaustively setting forth relevant case law and professional commentary, held that the admission of the statement at trial violated the McNabb-Mallory doctrine, and set aside the conviction.

We respectively refer this Court to that opinion, and will not here attempt to put forth in detail the various

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*Detective Blancato did state that at the May 26 confrontation he "advised them both of their rights again." (Tr. 233).

arguments there advanced. We only summarize the relevant findings on which the Court based its judgment.

The Fifth Circuit interpreted the current state of the law as follows:

> "In view of Justice Warren's dissent in Crooker*/ and Cicenia**/ and the concurring opinions of Justices Black, Douglas, Brennan and Stewart in Spano,***/ it now appears that a majority of the justices of the Supreme Court recognize the constitutional right to counsel during police interrogation in cases involving prosecutions by the State. It also appears that in federal prosecutions the McNabb-Mallory doctrine promotes the likelihood of the Supreme Court's being receptive to the recognition of the right." 322 F.2d at 775.

The Court further relied on recent cases decided by the New York Court of Appeals which have held that the admission of evidence obtained by the police from the defendant in the absence of counsel after indictment was a violation of due process. People v. Di Biasi, 200 N.Y.S. 2d 21, 166 N.E. 2d 825 (1960); People v. Waterman, 216 N.Y.S. 2d 70, 175 N.E. 2d 445 (1961); People v. Meyer, 227 N.Y.S. 2d 427, 182 N.E. 2d 103 (1962).

Also, the court took notice of the fact that even United States Courts of Military Appeals, which do not grant

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*/ - Crooker v. California, 357 U.S. 433 (1958).

**/ - Cicenia v. LaGay, 357 U.S. 504 (1958).

***/ - Spano v. New York, 360 U.S. 315 (1959).

the accused all of the constitutional rights of a civilian, have reversed convictions on the ground that a person suspected of crime "is entitled to counsel during an investigatory interrogation even before charges have been filed against him and before his right to military counsel accrues. United States v. Gunnels, 1957, 8 USCMA 130, 23 CMR 354; United States v. Rose, 1957, 8 USCMA 441, 24 CMR 251." 322 F.2d at 778.

The Court in Lee recognized that "Police must be given considerable latitude in questioning suspects and witnesses when an effort is being made to determine whether there is probable cause to believe that a crime has been committed." 322 F.2d at 776. (Emphasis added). The only distinction between the Lee case and the present situation is that here defendants had not yet been indicted when the police interrogation took place nineteen days after they were brought before the committing magistrate and put in jail. But the Court in Lee made clear that its rationale did not depend upon the technicality of whether an indictment had been returned; rather, the pertinent inquiry was whether the police needed continued power to investigate various suspects to a crime, or whether "the whole power of the Government is directed against one imprisoned individual, as preparations are made for his prosecution before a Judge and jury."

The latter description certainly applies here. Surely the government may not be held to contend that the defendants were merely "sitting it out" in jail for three weeks while the police investigated the crime. They were formally taken into custody and committed under Rule 5(a). The fact that so long a delay exists in the District between imprisonment and indictment of indigent prisoners is regrettable; this unfortunat situation, however, surely should not be construed to give the police an extended period in which to question the defendant without benefit of counsel for the purpose of securing admissions of guilt. The Court in Lee found that the defendant had an absolute right to counsel "starting no later than after indictment"; we assert that under the facts of the present case the right to counsel attached before indictment, after the defendants had been imprisoned for a lengthy period, and rendered the confession extracted from Johnson by the police inadmissible at the trial.

There can be little doubt that within the foreseeable future an indigent accused prisoner in a federal proceeding will have the right to have counsel appointed on his behalf as of the time he is taken before the committing magistrate. In 1963, a committee appointed by the Attorney General to study the impact of poverty on federal criminal justice found:

> "[A]n adequate system of representation would make counsel available to the accused in the earlier

> stages of the proceedings. . . . [I]n many situations lack of representation of the accused in earlier phases of the proceedings operates to the prejudice of defendant's rights. . . . The failure of the practices in most districts to provide early representation of the accused must, therefore, be regarded as a serious deficiency." Attorney General's Report on Poverty and the Administration of Federal Criminal Justice (1963), p. 24.

Based on this finding, the Report recommended that:

> "Counsel for an accused who is financially unable to obtain representation should be appointed by the United States Commissioner at a time not later than the accused's first appearance before the commissioner. If the accused is brought first before the court, rather than the commissioner, the judge should appoint counsel at that time." Attorney General's Report, p. 39.

Partially motivated by these findings, the Advisory Committee on Criminal Rules to the Judicial Conference of the United States has proposed amending Federal Criminal Rule 44 to provide as follows:

> "(a) Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment." 328 F.2d 32 (yellow pages).

The Committee's comment on the revision of Rule 44(a) states:

> "This subdivision expresses the right of the defendant unable to obtain counsel to have such counsel assigned at any stage of the proceedings from his initial appearance before the commissioner or court through the appeal, unless he waives such right. The phrase 'from his initial appearance before the commissioner or court' is intended to

require the assignment of counsel as promptly as possible after it appears that the defendant is unable to obtain counsel." 328 F.2d 33 (yellow pages).

At the same time, President Kennedy recommended to Congress that legislation be enacted to guarantee defendant counsel at all times from his initial appearance before the commissioner. This request was largely based on the following letter from the Attorney General to the President dated March 6, 1963:

> "Under typical procedures prevailing in the Federal system, no attorney is appointed to represent the needy defendant until he is arraigned, that is, required to plead to the charge against him. The preliminary examination before the commissioner and the grand jury stage pass without the accused having the benefit of counsel or investigation.
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> * * *
>
> "[T]he provision guaranteeing counsel at every stage of the proceedings, commencing with the initial appearance before the commissioner, is designed to afford representation to each defendant throughout his involvement in the judicial process. It insures that the advice of counsel will be available at the critical early stages when recollections are fresh and the opportunity to uncover evidence is greatest." H. Rep. No. 864, 88th Cong. 1st Sess., p. 7.

Two bills, S. 1057 and H.R. 7457, have been passed by their respective bodies and presently are awaiting action by a joint conference committee. Although the two bills have some varying sections, both provide that:

> "A defendant for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United

> States commissioner or court, or from any subsequent stage at which counsel is appointed, through appeal." Section 2(c) of S.1057 and 2(b) of H.R. 7457.

In sum, the growing recognition of the need for the prisoner to have benefit of counsel from the time of his confinement, rather than merely at the time he is arraigned, has finally brought sufficient pressures to bear on the Department of Justice, the Judicial Conference, and the Congress so that there can be little doubt that the situation will soon be rectified. Professor Chafee's firmly held belief is finally being recognized: "The time a defendant needs counsel most is immediately after his arrest and until trial." Chafee, 2 Documents on Fundamental Human Rights, p. 541 (1952).

We do not ask this Court to anticipate the pending legislation and amendment of the criminal rules so as to provide all indigent prisoners with counsel at the time they are brought before the commissioner--although this Court might well consider so providing in a local court rule. What we do ask is that this Court make clear that the police are not to take advantage of the indigent's lack of counsel during his long confinement prior to indictment and arraignment; that an indigent not be subjected to questionings by the police long after any true investigatory purpose has ended and the only purpose of the government is to strengthen its case against the prisoner for presentation to the grand

jury; that this Court hold that such interrogation of a prisoner without benefit of counsel may well constitute a violation of due process; and that, a fortiori, such confessions obtained from the prisoner be declared inadmissible under the McNabb-Mallory doctrine.

This was the essence of the holding of the Court in Lee v. United States, supra. We ask this Court to follow the Fifth Circuit's lead and find that the government's introduction at trial of Johnson's alleged confession to officer Blancato constituted reversible error.

III. <u>There was plain error, prejudicial to the rights of appellants to a fair and impartial trial, in the Court's charge to the jury on credibility</u>.

It is clear from the record herein, and the Judge so advised the jury, that credibility was a critical issue in the case. The instructions of the Court to the jury on the issue of credibility unwittingly but effectively prejudiced the appellants' rights to a fair trial. Although no objections were made to the instructions, they were plainly erroneous and affected substantial rights of the appellants.

The portion of the instruction complained of reads as follows:

> "You may also consider if you wish to do so, but you are not bound to do so, the fact that by calling the police in the first instance and later coming into this court, the complaining witness has exposed himself to grave public censure and condemnation, and he has exposed his family as well to shame and embarrassment. You may therefore, if you think proper, consider and balance the conduct that he admits he was embarked upon that night, against the fact that he was willing to appear in this courtroom when he could have avoided that and thus spared himself and his family the shame and the anguish that has now come to him and to them as a result of his own folly and his own misconduct.
>
> "Having discussed this much about the problem of weighing the credibility of witnesses, and at the moment of the complaining witness, let me now turn to the credibility of the defendant Johnson, who testified in a manner directly contrary to Mr. Rosenberg on some of the most critical and important facts of the case.

> "That the defendant Johnson testified and described conduct on his own part which you may well regard as repulsive and degrading is not necessarily something that would lead you to reject all of his testimony. It does not follow, because a witness admits to acts which you would abhor, that you must necessarily find, solely on that ground, that his testimony is untrue. Here you must weigh Johnson's testimony in the light of all the factors I have told you, including the reasons or motives which Johnson may have had for not telling the truth. What Johnson has to gain or to lose by testifying in the way he did, his appearance and demeanor on the stand, as I indicated before, are factors, and, broadly, whether he seemed to be a truth-telling person." (Emphasis added).

In the first quoted paragraph the Court suggested that, although he could have avoided it, the complaining witness instead "exposed himself to grave public censure and condemnation" and "exposed his family as well to shame and embarrassment." The instruction infers that the complaining witness' only possible motivation was to see the defendants brought to justice for the alleged robbery. The instruction imputes a certain nobility of purpose to the complaining witness.

The record we submit presents an equally supportable inference of an ignoble motive in the testimony of the complaining witness. He testified that he had received black eyes, a broken nose and a lot of bruises at the hands of the appellants. (Tr. 54). He also testified that he had a wife and three children. His decision to call the police and tell them the fabricated story that three persons had

forcibly entered the premises and beaten him up provided a convenient alibi for his physical condition to his wife and children. His original call to the police did not manifest a noble purpose of a citizen wishing justice to be done despite possible personal embarrassment; Rosenberg instead fabricated a tale whereby he was the innocent victim of uninvited robbers.

The next morning the complaining witness was called to police headquarters at approximately ten o'clock. (Tr. 60). He repeated his original story in the presence of the appellants who in his words "became very demonstrative and there was a lady secretary in the office and they became quite uncouth, and at that time they removed these two people." After their removal, the complaining witness admitted he had been lying and that he had picked up the defendants for the purpose of engaging in sexual acts. It was not until Rosenberg knew he was in trouble that he recanted his lie.

Although the record is not specific, it is probable in the light of appellant Johnson's testimony at the trial that the "uncouth" remarks implicated the complaining witness as a participant in an act of sodomy. In the District of Columbia sodomy is a felony punishable by up to ten years imprisonment. (22 D.C. Code § 3502). Although conjectural, we suggest it is not overly cynical under the circumstances revealed by the

record to hypothesize that the complaining witness' "willingness to testify against the appellants was in order to avoid being a defendant himself on the charge of sodomy.

We recognize there is nothing tangible in the record which supports the foregoing hypothesis, but submit that in the dubious circumstances of this case an instruction inferring only a high-minded motive to the testimony of the complaining witness was necessarily prejudicial to a fair and impartial trial for the appellants when equally supportable inferences could be drawn from his "willingness" to appear as a witness.

Further the Court's instruction in referring to the conduct of the complaining witness described it merely as "the conduct that he admits he was embarked upon that night" and "folly" and "misconduct"; whereas the Court characterized the conduct of defendant Johnson as repulsive, degrading and abhorrent. Also we believe the Court's use of the underscored words "necessarily" and "all" were clear indications to the jury that the Court believed at least some of Johnson's testimony should be rejected.

In summary, the quoted portion of the instruction may have been unduly influential in suggesting to the jury that the willingness of the complaining witness to give testimony was solely due to his devotion to truth, whereas the testimony of the defendant Johnson was a fabrication designed

solely to save his skin.

We are not unmindful of the general rule announced by this Court in Roberts v. United States, 109 U.S. App. D.C. 75, 77, 284 F.2d 209,210 (1960), that instructions to the jury must be judged by consideration of the charge as a whole. We believe, however, that the prejudice created by the quoted instruction, which related directly to the persons involved in the trial, was not cured by the subsequent general statement to the jury "that you and you alone must decide which witnesses are telling the truth and which witnesses are not telling the truth." (Tr. 279).

IV On the whole of the testimony there was insufficent credible evidence for a reasonable mind to believe the appellants guilty of the crime as charged.

This Court has made clear that sufficiency of the evidence in a criminal case is not tested merely by whether the government has presented a prima facie case, which if believed, meets the minimum requisites of proof. Instead, the reviewing Court must look at all the evidence to determine if, on that basis, a reasonable man must have had reasonable doubts as to guilt. "[I]f upon the whole of the evidence a reasonable mind must be in balance as between guilt and innocence, a verdict of guilty cannot be sustained." Curley v. United States, 81 U.S. App. D.C. 389, 393, 160 F.2d 229, 233 cert. denied, 331 U.S. 837 (1947).

The fact that the jury returned a verdict of guilty against these appellants does not weaken the argument that the evidence was insufficient to sustain a conviction. The object of a minimum requirement is to protect defendants from the whims of a jury when the evidence does not measure up to a legal standard of sufficiency.

The testimony of the complaining witness was on its face so unreliable as not to meet the minimum requirement of evidence to justify a conviction. He admitted having

told the police palpably inconsistent stories of the happenings on the evening of May 6. Appellants agree with the instruction of the Court below that the mere fact that the complaining witness may have been guilty of illegal or immoral action is a separate matter that has nothing to do directly with the guilt or innocence of the appellants. We assert, however, that the conduct of the complaining witness as disclosed by his own testimony reduced his credibility to the point where a conviction could not reasonably have been based upon it.

Further, sordid as it may be, the testimony of defendant Johnson produces an entirely consistent and believable story of a man (the complaining witness) who in order to satisfy his sexual depravity was willing to and did pick up the two appellants (one of whom he know from a previous meeting (Tr. 179)) and paid them for services rendered.

The Court should also consider the nature of the articles allegedly robbed from the complaining witness by the appellants. Aside from the money, part of which the complaining witness admits having given to the appellants, the items robbed consisted of a ballpoint pen and a knife corkscrew, both of which items the complaining witness freely gave away in promoting his business. Certainly a

person who admittedly picked up the appellants for his acknowledged purposes would not have any compunction about giving away a souvenir ballpoint pen and knife corkscrew. As to the $20 gold certificate, we submit a man who admittedly picked up the appellants for immoral purposes and took them to his office to accomplish such purposes might well have been willing to part with almost anything to satisfy his depraved desires.

The complaining witness testified that almost as soon as he had invited the appellants into his car, he changed his mind and wanted to get rid of them. The record shows he had ample opportunity to have gotten rid of the appellants had he in fact wished to do so. He drove several miles through a densely populated area of the city from the place of the pickup to his office. (Tr. 77). At one point he stopped at a gas station to permit one of the appellants to get out of the car to obtain soft drinks to be used as chasers with the liquor they planned to consume at his office. (Tr. 52 3, 79-80) He could easily have driven off and left appellant Stewart, at which point he would only have had to get rid of appellant Johnson. The record is clear that the complaining witness made no effort of any kind to implement his alleged decision to get rid of the appellants.

Another point of inherent improbability in the testimony of the complaining witness is his insistence

that it was not until the following morning at police headquarters that he realized the appellants were not girls. He had spent approximately an hour with them. Officer Neary testified that he had no trouble in identifying the appellants as males impersonating females on the basis of a momentary encounter. (Tr. 172-3).

In a case which depends solely on the credibility of the testimony of the complaining witness as does this, it is of particular importance that the Court exercise responsibility that such testimony have a scintilla of reliability about it before entrusting the case to the jury. Here the testimony of the complaining witness is redolent with the stench of unreliability.

The credible evidence was insufficient to support a guilty verdict, and the Court should alternatively have granted defendants' motion for acquittal or have directed a verdict of acquittal at the close of the evidence.

CONCLUSION

For the foregoing reasons, the judgment of the District Court in this case should be reversed.

Respectfully submitted,

May 8, 1964.

/s/ Henry T. Rathbun

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Counsel for Appellants
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellants has been served on David C. Acheson, Esq., United States Attorney in and for the District of Columbia, United States Court House, Washington, D.C., this 8th day of May, 1964.

/s/ Henry T. Rathbun

Henry T. Rathbun

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

160B

No. 18243

TOMMIE A. JOHNSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 18244

LEON STEWART, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
GERALD A. MESSERMAN,
JOHN A. TERRY,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. Was there probable cause for appellants' arrest when the two arresting officers concluded, independently of each other, that appellants matched perfectly the descriptions of two participants in a robbery which had been given to them less than an hour earlier?

2. Was a statement made by one appellant in the presence of the other, without counsel, to a detective who interviewed them both at the jail, admissible in rebuttal as a prior inconsistent statement to impeach the testimony of that appellant, when the interview took place long after appellants' initial presentment before a committing magistrate but before indictment?

3. Were the trial court's instructions on credibility so prejudicial as to amount to plain error affecting substantial rights?

4. Was the evidence sufficient to sustain appellants' conviction of robbery?

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18243

TOMMIE A. JOHNSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 18244

LEON STEWART, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On June 10, 1963, Tommie A. Johnson and Leon Stewart were indicted for robbery in Criminal Case No. 529-

63. They were tried by a jury in the District Court on August 2 and 5, 1963, before Judge Burger of this Court, sitting by designation. The jury found them guilty, and by judgment and commitment filed October 11, 1963, each received a prison sentence. Johnson was sentenced to a term of two to ten years, and Stewart received four to fifteen years. The trial court granted them leave to appeal *in forma pauperis*.

The Offense

Howard M. Rosenberg, the victim of the robbery, testified at the trial that shortly after 10:30 p.m. on May 6, 1963, he was driving north on Eleventh Street, N.W. Mr. Rosenberg, a numismatist by avocation, had just left a meeting of a coin club to which he belonged at the Smithsonian Institution and was headed toward his home in Silver Spring. Somewhere in the 1100 or 1200 block of Eleventh Street he saw what he believed to be two women walking along the street to his right (Tr. 49-50, 74-75). The two ostensible women later turned out to be appellants Johnson and Stewart, not women at all, but on the night in question "they were dressed in ladies clothes, with hair-dos and makeup, high heels, and gave every indication of being females" (Tr. 50). Mr. Rosenberg had never seen them before (Tr. 51, 75) and did not learn that they were men until after they were arrested the next morning (Tr. 53). They waved and flagged him down. Mr. Rosenberg stopped his car (Tr. 51), apparently believing them to be ladies of the evening. Appellant Johnson approached and asked him if he was "sporting," [1] and both appellants got into the front seat of Mr. Rosenberg's station wagon (Tr. 52, 75, 117). As they drove away, Mr. Rosenberg agreed to pay appellant

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[1] Mr. Rosenberg testified:

> I believe the exact words were, asking me if I was, in their words sporting.
>
> Q. Did you know what that meant?
>
> A. Yes, sir. (Tr. 52)

Johnson five dollars for services to be subsequently rendered (Tr. 78). Mr. Rosenberg was somewhat nonplussed, however, at the presence of appellant Stewart, for he had contemplated dalliance only with Johnson (Tr. 76-77, 122, 125).

> Q. . . . And at that point did you tell Stewart that you didn't want him to go along?
> A. I made mention of it.
> Q. What did you say to him?
> A. I said something to the effect of what is she coming for. And Johnson said "She goes where I go," something on that order.
> Q. So then you agreed to take her along, or him along, is that correct?
> A. Yes, sir. (Tr. 78-79)

The trio proceeded to Mr. Rosenberg's office at 3736 Tenth Street, N.E., next door to his place of business, House of Wines, Inc. Along the way they made one stop at a gasoline station, where appellant Stewart purchased some soft drinks for use as chasers for the drinks that they expected to consume (Tr. 52-53, 79, 117-118). Mr. Rosenberg meanwhile had begun to have serious misgivings about his two pickups, based mainly on the manner in which they were talking, and tried to figure a way out of his predicament (Tr. 53, 80, 123). He concluded that the best thing to do would be to pay them and get rid of them (Tr. 87), and so he made no effort to extricate himself during the automobile ride.

But Mr. Rosenberg's strategy suffered the fate of the best-laid plans of mice and men. The three arrived at their destination and went inside the office, where appellants immediately asked for something to drink (Tr. 54, 118). Mr. Rosenberg brought out a bottle of bourbon and placed it on a table with some glasses, and appellants helped themselves (Tr. 81-83, 118-120).[2] Mr. Rosenberg took some liquor in a glass but did not drink any

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[2] The police found a fingerprint of appellant Stewart on a whisky bottle in Mr. Rosenberg's office (Tr. 144-149, 153-157).

(Tr. 119). He then gave appellants each five dollars and asked them to go (Tr. 54, 68, 85). Appellant Stewart, at Johnson's suggestion, began to go through Mr. Rosenberg's jacket, which was on a nearby chair, whereupon Mr. Rosenberg threatened to call the police if they did not leave (Tr. 124). At this the two objects of his concern became infuriated and began to beat him up, blackening his eyes and hitting him in the head with their fists (Tr. 54, 86, 104-105). He tried to pick up a two-by-four that was lying on the floor, but it was out of reach (Tr. 54, 102-103). Both appellants attacked him at the same time, and he found it difficult to defend himself. One of them threw a glass jar at him; appellant Johnson took an electric typewriter and flung it on the floor (Tr. 54, 106). The two of them went through Mr. Rosenberg's pockets and took his money (about $75) and other belongings (Tr. 57-58, 68), including a $20 gold certificate, series 1928, which was later recovered and which he identified at the trial as his own (Tr. 70, 109). Appellants then beat him a little more, threatened to hit him with a bottle, forced him into a back room, and left (Tr. 54). Mr. Rosenberg called the police.

Appellant Johnson's version of the incident was quite different. He testified[3] that he had known Mr. Rosenberg since the last part of January 1963. The two had first become acquainted when Johnson was working at the Ebony Grill as a strip-tease dancer under the name of "Shandora" (Tr. 179, 195-196). They went out together and saw each other "quite a few times" thereafter (Tr. 190, 197). Appellant Johnson's testimony was substantially similar to that of the complaining witness regarding the preliminary maneuvers on the night of May 6: the female attire, the stopping of the car,[4] the conver-

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[3] Appellant Stewart did not testify, nor did he put on any other evidence in his own behalf.

[4] Appellant Johnson testified that he and Stewart had been picked up on Fourteenth Street, N.W., between T and V Streets (Tr. 180), not on Eleventh Street as Mr. Rosenberg had said.

sation about "sporting," Mr. Rosenberg's reluctance to bring along appellant Stewart,[5] and the purchase of the soft drinks at the service station (Tr. 180-181, 204-205, 211-212). There was a variance in appellant's recollection of the financial arrangements; Johnson testified that Mr. Rosenberg agreed to pay each appellant ten dollars, not five (Tr. 182). After arriving at the office, appellants got a fifth of bourbon out of a cabinet, and Johnson took a small drink (Tr. 182, 184). Mr. Rosenberg did not partake, but Johnson could not recall whether Stewart drank anything or not (Tr. 184-185). Then, according to Johnson, Mr. Rosenberg spread a large piece of canvas on the floor (Tr. 185) and removed all his clothing except his shoes and socks (Tr. 191-192). He gave each appellant ten dollars, and all three of them lay down on the floor, with Mr. Rosenberg in the middle. They committed an act of sodomy (Tr. 185). Appellant Johnson testified:

> And then he wanted to keep on going, so I asked him for more money, for ten dollars more. And he gave—he went to his car,[6] and got a twenty-dollar bill, and came back and gave me the twenty and I transferred my ten to Stewart to make him have twenty and I had twenty dollars. (Tr. 185)

There was more sexual activity. Then, according to Johnson's testimony, Mr. Rosenberg asked Johnson to perform a particular sodomitical act on him. Johnson demanded more money. Mr. Rosenberg said he did not have any more, and Johnson "told him if he didn't have no more, he couldn't get no more" (Tr. 186). Appellants got up and started to leave. Mr. Rosenberg grabbed Johnson by the arm. Johnson testified that he then relieved his arm from Mr. Rosenberg's grasp and hit him once in the face

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[5] Johnson said that he had introduced Stewart to Mr. Rosenberg as "Gladys" (Tr. 212).

[6] Mr. Rosenberg had testified that he never left the office during the entire incident because he did not trust appellants alone there (Tr. 101-102, 121, 123, 129).

with his fist. Appellant Stewart slapped him (Tr. 186-187, 199-200). There was no further fighting, and appellants left together in a taxicab (Tr. 187, 189). Appellant Johnson denied throwing either the glass jar or the typewriter and denied taking any money from Mr. Rosenberg other than the $20 gold certificate, which he said had been given to him by the complainant (Tr. 185, 187, 197-201).

The Arrest

When he reported the robbery to the police, Mr. Rosenberg gave them a story that was partially untrue. He told them that he had been working late in his office on the evening of May 6 when there came a knock at the door. When he responded, a man and two women forced their way in, beat him up, and robbed him. The descriptions of the two women which he gave to the police were actually descriptions of appellants,[7] but the part about the man was a fabrication. The following morning, when he was called down to police headquarters to identify three suspects (appellants and a third man who was arrested with them), Mr. Rosenberg admitted to the police that he had made up the story about the housebreaking and that there was no third man (Tr. 59-60, 89-91, 113-114). His reason for lying to the police, he explained, was simply that he "didn't like the idea of having been beaten up by two women"[8] (Tr. 60).

On the morning of May 7, 1963, at approximately 8:30 a.m., Officers Joseph Neary and David McAlister of No. 1 Precinct were cruising in their patrol wagon when they received a call regarding some disorderly persons at

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[7] The descriptions were evidently rather complete (see Tr. 13-14), even down to the detail of a bandage which appellant Johnson was wearing on his leg. A piece of bandage was found at the scene (Tr. 66-67).

[8] It will be recalled that Mr. Rosenberg did not know that appellants were men until after he came down to the police station (Tr. 53, 80, 104).

the Executive Lunch at Fifth and F Streets, N.W. When they arrived, the owner of the restaurant pointed out three persons, appellants and another man, seated at a table and "stated they were causing customers trouble in there and he wanted them to leave the restaurant and get out of the restaurant" (Tr. 7). Officer Neary stayed about ten feet behind, and Officer McAlister went over and spoke to the three individuals. They arose from the table and left the restaurant with the two officers (Tr. 15). No arrest was made inside the restaurant; the police merely escorted them to the exit at the request of the proprietor, who said they were bothering his customers (Tr. 15, 18). Once out on the street, the officers got a good look at the two appellants and suddenly realized that they "fitted perfectly" the descriptions of the two alleged female robbers at the House of Wines which had just been read to them at roll call less than an hour earlier (Tr. 8-9, 16, 18, 22). At this point, as a result of that description, the officers placed appellants under arrest for robbery and housebreaking[9] (Tr. 9, 16, 19). At the time of the arrest appellants were dressed in women's clothes, but the arresting officers had had considerable prior experience with female impersonators[10] and recognized appellants as such (Tr. 172-173). The officers put them in the patrol wagon and drove them to the central cell block at police headquarters, where they were

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[9] Appellants' companion became belligerent and was arrested on a charge of disorderly conduct (Tr. 16).

[10] Officer Neary testified:

> Q. You were asked whether or not you had trouble recognizing these defendants as female impersonators. Approximately how many times, Officer, have you had occasion to arrest female impersonators?
>
> A. As far as arresting them goes, not too many times. But in the way, we get a lot of transports from Morals Division to pick up those impersonators. We have to bring them down to cell block and transport them over to court. I couldn't tell you how many times. An awful lot. . . . I have been in there [driving a patrol wagon] six years and I have had quite a number of them. (Tr. 174)

searched, booked, and fingerprinted. The search disclosed a pen [11] and a knife-corkscrew bearing the name of House of Wines, Inc., in Stewart's handbag (Tr. 163), a small change purse containing $16 inside Stewart's brassiere (Tr. 167), and another purse containing Mr. Rosenberg's $20 gold certificate and an additional $40 inside Johnson's brassiere (Tr. 168-170). The pen and the knife-corkscrew were identified by Mr. Rosenberg as having been taken from him during the robbery (Tr. 57-58), and all the items were introduced into evidence (Tr. 72, 168, 170).

The Trial

The complaining witness and the police officers testified regarding the robbery and the arrest of appellants. On cross-examination appellant Johnson was asked whether he had made a statement to Detective Blancato at the jail on May 26, 1963, to the effect that he had taken Mr. Rosenberg's money by force after Rosenberg had offered him five dollars and asked him to leave (Tr. 210-211). He denied having made such a statement. The Government then brought forth Detective Blancato of the Robbery Squad, who testified that he had visited both appellants at the jail on May 26 after they had signed a form giving their voluntary consent to be interviewed by a police officer (Tr. 222). Detective Blancato said that he and his companion (who was not identified) "advised them both of their rights again, told them why we were there, and asked them if they wanted to talk to us. They did" (Tr. 233). Blancato stated that Johnson then recounted to him the events of May 6 substantially as Mr. Rosenberg had previously testified, except for the place of the pickup, which Johnson said was near Fourteenth and T Streets, N.W., and the contemplated stipend for the evening's activities, which by now had been inflated to $20

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[11] Appellant Johnson testified that Mr. Rosenberg had given Stewart the pen to write down Rosenberg's phone number (Tr. 188).

apiece (Tr. 233-235). The prosecutor expressly informed the court that this testimony was offered solely as evidence of a prior inconsistent statement for the limited purpose of impeachment (Tr. 229-230), and the court so instructed the jury directly after Detective Blancato left the stand (Tr. 236-237).

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

RULE INVOLVED

Rule 30, Federal Rules of Criminal Procedure, provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

SUMMARY OF ARGUMENT

The record is clear that appellants were not arrested until they were outside the restaurant. The two police officers, who had been summoned by the proprietor, merely asked them to leave and escorted them to the door. It was not until they got outside that the officers got a good look at them and realized that they fitted perfectly the descriptions of the two alleged female participants in a robbery at the House of Wines. Had they not been so recognized, they would have been free to leave. The fact that they matched the descriptions of the robbers down to the last detail, together with all the other circumstances of the moment as the officers saw them, constituted ample probable cause for their arrest.

The statement made by Johnson to Detective Blancato at the jail would have been admissible even in the Government's case in chief. It is not rendered inadmissible by the *Mallory* rule, because it was made after appellants had been presented before a committing magistrate and not during a period of unnecessary delay. A confession made under virtually identical circumstances has expressly been held admissible by this Court as recently as 1960. Appellants have cited only one New York case, which of course is not binding on this Court, in support of their contention that the statement was inadmissible. Even the recent *Massiah* case would not require its exclusion, for appellants had not yet been indicted at the time the statement was made. Moreover, the statement was admitted and received for the limited purpose of impeachment. The court correctly instructed the jury in this regard, and the jury must be presumed to follow the court's instructions.

Taking out of context a portion of the court's charge on credibility, appellants speculate that it may have suggested an improper conclusion to the jury in such a way as to amount to plain error. But the court's words cannot properly be read in such a manner. Considered in their

entire context, they are clearly correct and in no way erroneous. Moreover, appellants did not object below to these instructions; there is in fact some indication in the record that they affirmatively concurred in them. Having failed to make timely objection, they cannot now assert that there was any error in the court's charge.

The evidence was legally sufficient to support appellants' conviction of robbery. Appellants' attack on the credibility of the complaining witness is without foundation in the record; his testimony was not so blatantly incredible as to require the jury to reject it *in toto*. Even were his testimony uncorroborated, which it is not, it would be sufficient to convict. The credibility of any witness is solely for the jury to determine. The jury evaluated the complainant's testimony in the light of all the evidence and decided that it was worthy of belief. That decision is not subject to challenge here.

ARGUMENT

1. Appellants were lawfully arrested for robbery and housebreaking outside the restaurant

(Tr. 5-24, 160-175)

At no time in the trial court did appellants suggest that they were arrested inside the Executive Lunch. Officer Neary testified that appellants were not placed under arrest until after they had been escorted outside. Appellants, after the officer had been examined rather thoroughly on this point (Tr. 15-19), did not contend otherwise. No evidence was adduced to the contrary. Now, however, they argue that the arrest was effected when the officers first approached them inside the restaurant, relying primarily on *Kelley* v. *United States*, 111 U.S. App. D.C. 396, 298 F.2d 310 (1961).

But *Kelley* is distinguishable on its facts. In *Kelley* the arresting officers had looked into a restaurant from the street and had seen the appellant seated at a counter next to a known prostitute. They entered the restaurant for

the express purpose of determining whether Kelley was "doing anything wrong." There was no indication that they had been summoned to the restaurant or that they had gone there for any other reason. In the case at bar, however, Officers Neary and McAlister had gone to the Executive Lunch on other business, in direct response to a call which came to them over the radio in their patrol wagon. Upon their arrival the owner pointed out the three persons, appellants and their companion, who had been the subject of the call. The officers spoke to appellants at the request of the proprietor and asked them to leave the restaurant, and appellants did so. It is quite clear from Officer Neary's testimony that the officers had expected and intended to let appellants leave and go about their business once they were out the door (Tr. 7-8, 15-16, 18). This conclusion is supported by the fact that their companion was arrested on a charge of disorderly conduct, based not on anything he had done inside the restaurant but rather on his obstreperous behavior outside on the street corner. In *Kelley*, on the other hand, it was equally clear that the arresting officers did not intend to let Kelley go about his business. One officer told Kelley that he wanted him to come outside and talk with him, and after they got outside the officer proceeded to ask Kelley a series of questions. Kelley was in custody from the instant he was first asked to leave the restaurant. Appellants, however, were not in custody but were merely being escorted to the exit. They would have been free to go immediately, had not the officers suddenly recognized them as suspects in a robbery and arrested them *for that robbery*. The resemblance between the *Kelley* case and the case at bar is superficial at best and is not dispositive of the issue under discussion. Compare *Freeman* v. *United States*, 116 U.S. App. D.C. 213, 322 F.2d 426 (1963).

That issue is simply whether or not the officers had probable cause to arrest appellants on the charges for which they were arrested. Probable cause must be deter-

mined from the viewpoint of a reasonably prudent police officer and must be evaluated in terms of the impression made upon him by all the circumstances of the moment. If he has reasonable grounds to believe, in the light of those circumstances, that a felony has been committed and that the person before him has committed it, he is then justified in placing that person under arrest. (*Sammie*) *Jackson* v. *United States*, 112 U.S. App. D.C. 260, 302 F.2d 194 (1962); *Dixon* v. *United States*, 111 U.S. App. D.C. 305, 296 F.2d 427 (1961); *Bell* v. *United States*, 102 U.S. App. D.C. 383, 254 F.2d 82, *cert. denied*, 358 U.S. 885 (1958); see *Brinegar* v. *United States*, 338 U.S. 160 (1949).

Here there can be no doubt of probable cause. In the course of an investigation pursuant to a radio bulletin their paths happened to cross those of appellants. Only a few minutes earlier they had been told of an alleged robbery and housebreaking at the House of Wines and had been given detailed descriptions of the three alleged culprits, two women and a man. Those descriptions were still fresh in their minds. They were complete even down to the bandage on Johnson's leg. When they saw appellants standing up in broad daylight outside the restaurant, the two officers concluded independently of each other (Tr. 16, 18) that appellants fitted perfectly the descriptions of the two women. It was at that point and not before, as the record clearly shows, that the officers placed appellants under arrest. The totality of the circumstances confronting the officers that morning on the corner of Fifth and F Streets was sufficient to constitute probable cause. *Ellis* v. *United States*, 105 U.S. App. D.C. 86, 264 F.2d 372, *cert. denied*, 359 U.S. 998 (1959); *Heard* v. *United States*, 197 A.2d 850 (D.C. Ct. App. 1964), *petition for allowance of appeal pending* (No. 18521); *Teresi* v. *United States*, 187 A.2d 492 (D.C. Ct. App. 1963). The items found on appellants' persons at the time of their arrest were properly admitted into evidence, and the trial court's denial of the motion to suppress was not error.

2. The prior inconsistent statement of appellant Johnson, made to the detective at the jail, was properly admitted for the limited purpose of impeachment

(Tr. 206-211, 220-237)

The most significant point raised on appeal concerns the admissibility of a statement made by appellant Johnson, in the presence of appellant Stewart, to Detective Blancato during an interview at the District of Columbia Jail. This interview was held on May 26, 1963, after appellants were arrested and after they had been initially presented before the United States Commissioner, but before the grand jury returned an indictment against them. Johnson's statement was offered in rebuttal and for the limited purpose of impeaching his earlier testimony, in which he denied having told Detective Blancato that he had robbed Mr. Rosenberg after Rosenberg had offered appellants money and asked them to leave. The jury was carefully instructed as to the purpose of Detective Blancato's testimony. Appellants now argue that because they were without counsel at the time of the interview Johnson's statement should not have been admitted for any purpose whatever. Such is not the law.

Johnson's statement to Detective Blancato would have been admissible even in the Government's case in chief. It was made long after he had been advised of his rights by the United States Commissioner, and accordingly the *Mallory*[12] rule does not apply. The fact that appellant did not have counsel at the time is immaterial. See *United States* v. *Killough*, 193 F. Supp. 905, 914-915 (D.D.C. 1961), *rev'd on other grounds*, 114 U.S. App. D.C. 305, 315 F.2d 241 (1962). This Court has expressly ruled admissible a confession made without counsel after initial presentment before the Commissioner under circumstances virtually identical to those in the instant case. (*Lester*) *Jackson* v. *United States*, 109 U.S. App. D.C.

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[12] *Mallory* v. *United States*, 354 U.S. 449 (1957).

233, 285 F.2d 675 (1960), *cert. denied*, 366 U.S. 941 (1961).

Appellants argue that the police should not be permitted to interrogate an accused prior to indictment unless he has counsel. At the trial they were unable to present the court with any authority for this novel proposition (Tr. 223), nor have they come up with any on appeal except for *People* v. *Meyer*, 11 N.Y. 2d 162, 182 N.E.2d 103 (1962), a 4-3 opinion which has not been followed by any federal court. Appellants rely heavily on *Lee* v. *United States*, 322 F.2d 770 (5th Cir. 1963). But *Lee* held inadmissible certain oral admissions made by a prisoner in the absence of counsel during a period of secret police interrogation *after indictment*. The court expressly refrained from holding that the right to counsel arose at any time before indictment, 322 F.2d at 778. This distinction is fundamental, and because of it appellants' arguments must fail.

The recent [13] case of *Massiah* v. *United States*, 84 S. Ct. 1199 (1964), is of no comfort to appellants. *Massiah*, like *Lee*, draws the line at the moment of indictment.[14] The precise holding of *Massiah* is that the Sixth Amendment right to counsel is violated by the use in evidence at trial of incriminating statements deliberately elicited from an accused by the police *after he has been indicted* and in the absence of his counsel. The result in *Massiah* was foreshadowed by the Supreme Court's holding in *Spano* v. *New York*, 360 U.S. 315 (1959). But extension of the exclusionary rule to the pre-indictment period has not found favor with any court outside the State of New York. *People* v. *Meyer*, *supra*. Appellee does not

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[13] The opinion in the *Massiah* case came down on May 18, 1964, some time after appellants' brief was filed.

[14] The fact that appellants were in jail at the time of their interview with Detective Blancato is immaterial. Lee was incarcerated, whereas Massiah was out on bond. The statements of both were held inadmissible for the same reason. Moreover, in *Massiah* there were elements of subterfuge and stratagem not present in the case at bar.

quarrel with the noble sentiments embodied in the Attorney General's Report and other sources which appellants quote in their brief at pages 23-26. Appellee merely points out that they do not reflect the law as it now stands. The millennium to which appellants look forward has not yet come. Until it does, statements such as that made by appellant Johnson under the circumstances here presented will remain admissible as evidence against the persons making them.

But assuming *arguendo* that Johnson's statement might have been inadmissible as direct evidence during the Government's case in chief (which appellee does not concede), it does not follow that such inadmissibility would require its exclusion when offered in rebuttal for the purpose of impeachment. The cases indicate to the contrary. Once an accused has taken the stand and testifies contrary to facts within the Government's knowledge, the Government has the right to impeach his testimony by offering appropriate evidence in rebuttal, even though such evidence might not be otherwise admissible. *Walder* v. *United States*, 347 U.S. 62 (1954); *Tate* v. *United States*, 109 U.S. App. D.C. 13, 283 F.2d 377 (1960); cf. *Lockley* v. *United States*, 106 U.S. App. D.C. 163, 270 F.2d 915 (1959).[15] By testifying appellant Johnson assumed the risk of impeachment; he cannot now complain that he was impeached. The instructions of the court on this question were clear and precise, and it must be presumed that the jury adhered to them. *Delli Paoli* v. *United States*, 352 U.S. 232 (1957); *Blumenthal* v. *United States*, 332 U.S. 539 (1947); *Dykes* v. *United States*, 114 U.S. App. D.C. 189, 313 F.2d 580 (1962), *cert. denied*, 374 U.S. 837 (1963).

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[15] *Lockley* was decided on other grounds, but the Court indicated *obiter* that were it squarely confronted with the issue it would follow the rule of the *Walder* case. *Lockley* v. *United States*, *supra* at 165 n.3, 270 F.2d at 917 n.3.

3. The court's instructions on credibility, to which appellants made no objection, were not erroneous

(Tr. 237-238, 275-279, 284-286)

Appellants quote a portion of the court's charge on credibility, emphasizing a few words and phrases isolated from their context, and speculate that it "may have been unduly influential in suggesting to the jury" that the complainant had told the truth while appellant Johnson had not. On this dubious premise appellants now contend that the quoted instructions were necessarily prejudicial to their right to a fair trial so as to amount to plain error. This contention is totally insubstantial.

Assertions such as those now made by appellants are not infrequently advanced by convicted defendants. "All too often, it seems, appellants like these become overcritical of a trial judge after conviction and on appeal seek to try him instead of the merits or demerits of their cause." *United States* v. *Breen*, 96 F.2d 782, 784 (2d Cir.), *cert. denied*, 304 U.S. 585 (1938). The remarks complained of must be examined in their proper context, particularly when they comprise a small portion of the court's instructions. It is axiomatic that the charge to the jury must be considered as a whole. *Askins* v. *United States*, 97 U.S. App. D.C. 407, 231 F.2d 741, *cert. denied*, 351 U.S. 989 (1956); *Kinard* v. *United States*, 69 App. D.C. 322, 101 F.2d 246 (1938). The courts "must guard against the magnification on appeal of instances which were of little importance in their setting." *Glasser* v. *United States*, 315 U.S. 60, 83 (1942); see *United States* v. *Thayer*, 209 F.2d 534 (7th Cir. 1954). Appellants' contentions are based largely on pure conjecture unsupported by anything in the record. They concede as much (Brief for Appellants, 30-31). Appellee submits that the challenged instructions, when read in their full context, do not suggest any such necessary conclusion as that which appellants now find. On

the contrary, the court expressly told the members of the jury that in their deliberations they must balance all the factors presented to them which might affect the credibility of the witnesses. This was a manifestly correct statement of the law.

Appellants did not see fit to make any objection to the trial court's instructions on the issue of credibility. Indeed, the record affirmatively shows that both sides jointly requested a special instruction on credibility "in view of the peculiar circumstances of this case" (Tr. 237). The court's entire charge on credibility is contained on pages 275-279 of the transcript. Approximately the first half consists of a general statement of the law such as can be found in virtually any criminal trial. It is the second half of which appellants are critical. In view of the express agreement of counsel to a special instruction on credibility, although that instruction is not precisely identified in the record, it is not unreasonable to conclude that the language of which appellants now complain may well have been the language which they expressly approved in the trial court. In any event, having failed to object to the instructions at the proper time, appellants are foreclosed from challenging them here. The only reservations which trial counsel had concerning the court's charge were directed to other matters (Tr. 284-286). Failure to make timely objection to the court's instructions precludes appellate review. Rule 30, F.R. Crim. P.; *Ruffin* v. *United States*, 106 U.S. App. D.C. 97, 269 F.2d 544, *cert. denied*, 361 U.S. 865 (1959); *Moore* v. *United States*, 104 U.S. App. D.C. 327, 262 F.2d 216 (1958), *cert. denied*, 359 U.S. 959 (1959); *Pitts* v. *United States*, 99 U.S. App. D.C. 63, 237 F.2d 217 (1956); *Wyche* v. *United States*, 90 U.S. App. D.C. 67, 193 F.2d 703 (1951), *cert. denied*, 342 U.S. 943 (1952); *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

4. The evidence of robbery was sufficient to sustain the conviction

(Tr. 47-130, 202-205, 211-213, 267-268; Sentencing Tr. 9-10)

Appellants' argument that the evidence was insufficient is essentially an attack on the credibility of the complaining witness. They characterize his testimony as being "redolent with the stench of unreliability" (Brief for Appellants, 36) and assert that it was "on its face so unreliable as not to meet the minimum requirement of evidence to justify a conviction" (Brief for Appellants, 33). Appellee submits that the issue of credibility is not for appellants to determine. It is fundamental that the credibility of witnesses is a matter solely within the province of the jury. Neither appellants nor appellee is in a position to decide whether the testimony of any witness, whether it be the complainant or anyone else, is or is not inherently incredible.

On appeal, if the evidence in a case is alleged to be insufficient, it must be reviewed in the light most favorable to the Government, making full allowance for the right of the jury to assess the credibility of witnesses and to draw justifiable inferences of fact from the evidence actually presented. *Glasser* v. *United States*, *supra* at 80; *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947); *Morton* v. *United States*, 79 U.S. App. D.C. 329, 147 F.2d 28, *cert. denied*, 324 U.S. 875 (1945). There was more than sufficient evidence to convict appellants of robbery if the jury saw fit to believe the testimony of Mr. Rosenberg, as they obviously did. It is settled that the uncorroborated testimony of a complaining witness is sufficient to sustain a conviction of robbery. *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951). Here the testimony of the complainant was corroborated by the tangible evidence found in appellants' possession at the time of their arrest—the $20 gold certificate, the pen, and the knife-

corkscrew. The alleged weaknesses in Mr. Rosenberg's testimony which appellants point out were for the jury, and only the jury, to evaluate. They do not render his testimony inherently incredible. For example, it is not unreasonable to believe that Mr. Rosenberg was unaware that appellants were male rather than female, despite the testimony of Officer Neary that he knew they were female impersonators as soon as he laid eyes on them. The two arresting officers had had prior experience with such individuals; Mr. Rosenberg apparently had not. Some female impersonators are quite successful in their impersonations, and some are not. Appellant Johnson testified that he had worked as a strip-tease artist, which would indicate that he, at least, belonged in the former category. It must be noted that the jury had the opportunity to observe both appellants throughout the trial. If their manner was effeminate, as it may well have been (see Tr. 202-205, 211-213, 267-268), it would have been easy for the jury to visualize them in women's attire and imitating women in their gestures and behavior. The jury simply weighed the testimony of Mr. Rosenberg, as corroborated by other evidence adduced by the Government, against the testimony of appellant Johnson.[16] They chose to believe Mr. Rosenberg. Their verdict was based on competent, sufficient evidence and cannot now be disputed.

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[16] The sentencing transcript, which is part of the record on appeal, reveals that at the time of sentencing Johnson admitted having lied on the witness stand about the extent of his prior acquaintance with Mr. Rosenberg (Sent. Tr. 9-10).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18,243 and 18,244

TOMMIE A. JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

LEON STEWART,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from Judgment of Conviction of
Robbery in Violation of § 22-2901
District of Columbia Code

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REPLY BRIEF FOR APPELLANTS

Without attempting to reply in detail to the Government's brief, we deem it sufficiently important to comment on the arguments there advanced on the points with respect to the illegality of the arrest and the admission of appellant Johnson's post arrest statement.

I

The Government's brief ducks the principal thrust of appellants' argument as to the illegality of their arrest.

Appellants contended in their brief (pp. 12-16) that they were under arrest at the time they were asked by the police to leave the restaurant, that there was no probable cause for such arrest at that time, and that the arrest without warrant was therefore unlawful. The Government has only partially joined issue with this contention, by disputing whether the appellants were under arrest at the time they were asked to leave the restaurant and were led out by the policemen. By its silence, the Government appears to admit that if the arrest did take place at that time, such arrest was unlawful.*

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* The Government argues at some length (pp. 13-14) that if the arrest did not take place until such time as appellants were led out into the street, the arrest at that time was with probable cause. That argument does not meet appellants' contention.

The Government seeks to avoid the impact of Kelley v. United States, 111 U.S. App. D.C. 396, 298 F.2d 310 (1961), by attempting to differentiate the intent of the arresting officers in the two situations. That is a wholly novel proposition of law. Surely, whether or not an arrest took place does not depend on the subjective motivations of the arresting officers--and, significantly, the Government cites no authority for its unique argument. As this Court has made clear, whether an arrest has occurred depends upon whether "the person arrested understands that he is in the power of the one arresting, and submits in consequence." Coleman v. United States, 111 U.S. App. D.C. 210, 218, 295 F.2d 555, 563 (1961), cert. denied, 369 U.S. 813 (1962). The Government in no way disputes appellants' contention that they had ample reason to believe they were under the control and in the custody of the officers when they were led out of the crowded restaurant by two uniformed policemen. The Government does not attempt to claim that this subjective intent of the arresting officers was ever communicated in any way to the appellants. Nor could the record support such a claim. Thus, it surely makes little difference that the officers "expected and intended to let appellants leave and go about their business" (Government Brief, p. 13), even if the record references cited by the Government supported that statement of expectation and intent, which they do not.

The Government's failure to take issue with the main thrust of appellants' contention that they were arrested unlawfully only serves to support the legitimacy of that position.*

II

1. Appellants in their principal brief contended that a statement made by one of the appellants when interrogated by the police 19 days after being taken before the committing magistrate, while in custody awaiting indictment, was improperly admitted. In support of their contention appellants argued that even though there might be no existing requirement to supply counsel during the period involved, the police should be barred from interrogating an imprisoned defendant without benefit of counsel and subsequently testifying as to the interrogation.

The Government in response sought to distinguish the use of Johnson's confession on the ground that it was obtained from him prior to his indictment for the crime, whereas the cases principally relied on by the appellants

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*In a last ditch attempt to avoid the merits of appellants' argument, the Government claims (Government Brief, p. 12) that appellants at trial never made the legal argument that they were under arrest inside the restaurant. Significantly, the record does not indicate any legal argumentation on when the arrest took place, and the facts relied upon in appellants' brief amply indicate that they were under arrest at that time.

admittedly involved post-indictment statements.

By subsequent decision of this Court in Ricks v. United States (No. 17771, June 9, 1964), the admission at trial of confessions made by a defendant without benefit of counsel subsequent to his having been taken before a committing magistrate, but prior to indictment was held to constitute reversible error. Appellants' contention that the distinction between a post-indictment and a pre-indictment confession was wholly technical was upheld by this Court. The rule laid down by the Ricks case necessitates the reversal of the convictions in the present proceeding.

In fact, the admission of the confession obtained in the present case appears even less justifiable than those ruled illegal in Ricks. Here, Johnson had been imprisoned for 19 days when the police interrogated him and extracted the confession admitted at trial. He had spent almost three weeks in the control and custody of the Government since the time when the committing magistrate had cautioned him about his Constitutional rights. Clearly there was no need for the police to make any further investigation of the alleged crime. Rather, they were preparing their "arsenal of weapons" against the defendants in preparation for the grand jury and trial.

2. The Government attempts to excuse the use of Officer Blancato's testimony (in which the alleged confession by Appellant Johnson was revealed) by claiming that it was used as rebuttal evidence for the purpose of impeachment rather than as part of the Government's case in chief. With due respect, the Government's position obviously cannot be supported and is directly contrary to the case on which it chiefly relies. Simply stated, the Government appears to claim that if a defendant denies the commission of the crime of which he is charged, the Government may then proceed to ask him on cross-examination whether he earlier confessed to having committed the crime, and, upon his denial of such confession, may proceed to introduce into evidence a confession otherwise inadmissible.

One would think that such an argument need not be refuted. If the Government cannot introduce the confession as proof of guilt, then it may not introduce the evidence for the purported purpose of "impeaching" of the defendant's denial of guilt. The case of Walder v. United States, 347 U.S. 62, 65, on which the Government relies, clearly points this out. In that case, the defendant went beyond a mere denial of his alleged crime, and claimed that he had never in the past sold narcotics to anyone. The Government was allowed to introduce evidence unlawfully obtained to impeach

the defendant's "sweeping claim that he had never dealt in or possessed any narcotics."

Mr. Justice Frankfurter, who wrote the Walder decision, made perfectly clear, however, that the Government cannot use unlawfully obtained evidence to "impeach" the defendant's claim of innocence to the very crime with which he was charged:

> "Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief."

The above quotation precisely describes what occurred in the present case. Appellant Johnson denied the crime, the Government on cross-examination then asked him if he had ever confessed to the crime, and, upon his denial, proceeded to introduce the confession which Appellants contend was illegally obtained.

CONCLUSION

For the foregoing reasons in addition to those expressed in Appellants' principal brief, the judgment of the District Court in this case should be reversed.

Respectfully submitted,

June 12, 1964.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief for Appellants has been served on David C. Acheson, Esq., United States Attorney in and for the District of Columbia, United States Court House, Washington, D.C., this 12th day of June, 1964.

HENRY T. RATHBUN

Henry T. Rathbun

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,243

TOMMIE A. JOHNSON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

No. 18,244

LEON STEWART, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

SUPPLEMENTAL MEMORANDUM

Appellee submits this memorandum in answer to questions from members of the Court at oral argument regarding (1) the evidence offered at the preliminary hearing in the instant case before the United States Commissioner, and (2) the possible retroactive effect of this Court's decision in Ricks v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 17771, decided June 9, 1964).

I

The testimony at the trial disclosed that the complaining witness, when he originally reported the robbery to the police, gave a story that was in part a fabrication. When he came to police headquarters on the morning after the robbery to identify two suspects who had been arrested, he admitted to the police that only a portion of his original story was true

and that he had made up the part about a third man. (See generally Brief for Appellee, 6, and cited pages of trial transcript.) At oral argument in this Court the Chief Judge expressed concern that the record of the preliminary hearing, which was held on May 28, 1963, three weeks after the complainant made his partial recantation, seemed to indicate that only the original version of the incident came out in the testimony of the police officer who was the Government's only witness.

Some time after oral argument appellee obtained from the United States Commissioner his original handwritten notes from which his statement of proceedings was prepared. The notes consist of three pages in the Commissioner's handwriting, Xeroxed copies of which are attached hereto as an exhibit. Attached also is a typewritten copy of the handwritten notes, prepared for the convenience of the Court. A few periods and a comma have been added on the second page, and other textual emendations and amplifications have been made throughout. The latter are enclosed in brackets and should be easily recognizable. Otherwise, however, the typewritten version is an exact copy of the notes as the Commissioner wrote them.

The first page contains only a summary of the proceedings on the two occasions on which appellants appeared before the Commissioner, including a notation at the bottom of the left margin to the effect that appellants requested a hearing without counsel.[1/] The second and third pages contain the notes taken by the Commissioner during the testimony of Detective Samen.

1/ Cf. Saunders v. United States, 114 U.S. App. D.C. 345, 316 F.2d 346 (1963); Nance v. United States, 112 U.S. App. D.C. 38, 299 F.2d 122 (1962).

Appellee respectfully directs the Court's attention to the left margin of the second page and to the entire third page, wherein the notes indicate that Detective Samen did testify regarding the partial untruth of the complainant's original report. Both in his direct testimony (second page) and on cross-examination 2/ by both appellants (third page), Detective Samen indicated that no third person was involved: "Mr. R[osenberg] said he was mistaken about a 3rd man . . . R[osenberg] said at 1st he was going to have relations / changed his mind / they beat him & robbed [him] . . . inv[estigation] showed he took them in."

2/ Appellee is informed that the Commissioner does not ordinarily transcribe any cross-examination on his statement of proceedings, although he does take handwritten notes during cross-examination as during direct examination, as the attached exhibit indicates. His finding of probable cause, of course, is based on evidence adduced by the Government on direct examination, for it is the Government that bears the burden of proof at the preliminary hearing as well as at trial. The Commissioner's statement of proceedings contains the substance of such testimony as is necessary to sustain his finding. Other than that it does not purport to be a complete record of everything that takes place at the preliminary hearing.

In the trial of another case the Commissioner was called to testify regarding the preliminary hearing in that case. On cross-examination, in response to questions by defense counsel and by the court, the Commissioner discussed the preparation of his transcript and how much of the testimony he summarizes in it. That case is now before this Court on appeal as Ward v. United States, No. 18420. Appellee respectfully directs the Court's attention to the testimony of the Commissioner at pages 377-378 of the trial transcript in Ward.

It should be noted that the Commissioner's finding of probable cause in the instant case has never been questioned by appellants, either in the District Court or in this Court. Compare Washington v. Clemmer, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 18602, opinion filed May 11, 1964), wherein the basis of such a finding was the crucial issue.

Thus it is apparent from the Commissioner's notes that there was indeed testimony at the preliminary hearing which showed that the complainant gave two versions of the robbery which in part conflicted with each other. Clearly the police officer did not testify to a version of the facts which he had known for three weeks to have been partially untrue. Detective Samen's testimony, as reflected in the Commissioner's notes, coincided with the evidence at trial to the effect that the complainant had in fact originally intended to have sexual relations with appellants and that the part about the third man was not true as originally reported. The fact remains, however, that the testimony at the preliminary hearing established (1) that there had been a robbery on May 6, 1963, and (2) that appellants had been shown to be participants in that robbery, both by the complainant's identification of them and by the presence of appellant Stewart's fingerprint on a whisky bottle found at the scene. The complainant's recantation of his story about the third robber did not affect the Commissioner's finding of probable cause as to the two appellants.

II

In their reply brief and at oral argument appellants cited the case of Ricks v. United States, supra, which had been decided after appellee's brief had been filed. At oral argument appellee maintained that the Ricks decision, because it was predicated on this Court's supervisory power over the District Court and not on any broad constitutional principle, should not be applied retroactively to invalidate the trial court's ruling on the admissibility of a statement made by appellant Johnson after his

initial appearance before the United States Commissioner. A member of the Court inquired whether appellee had any authority in support of its argument against retroactive application of Ricks. The purpose of this section of the instant memorandum is to provide such authority.

The case which comes most readily to mind is Durham v. United States, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954). In Durham this Court established a new test of criminal responsibility in the District of Columbia in the exercise of its local supervisory power. Both Durham itself and subsequent opinions made it clear that the new test was not to be applied retroactively but only prospectively, to cases tried after the Durham decision came down. Durham v. United States, supra at 240-242, 214 F.2d at 874-876; Stewart v. United States, 94 U.S. App. D.C. 293, 296, 214 F.2d 879, 882 (1954); Jordan v. United States, 95 U.S. App. D.C. 27, 217 F.2d 670 (1954); Stogner v. United States, 97 U.S. App. D.C. 172, 229 F.2d 513 (1955); Watson v. United States, 98 U.S. App. D.C. 221, 223, 234 F.2d 42, 44 (1956). Of particular significance are Jordan and Stogner, wherein this Court affirmed convictions in cases tried before Durham in which the defense of insanity had been raised, rejecting arguments that the new Durham rule should be retroactively applied.

Also in point is the case of Couch v. United States, 98 U.S. App. D.C. 292, 235 F.2d 519 (1956). In Couch this Court, sitting en banc, established a new rule regarding sentencing procedures in the District of Columbia. In so doing the Court stated in a per curiam opinion:

> In our supervisory capacity we now establish this procedure for this jurisdiction, but we apply it

> prospectively only, that is, to sentences imposed after a certified copy of our judgment in these cases is issued to the District Court, which is to be done forthwith. [Citing Durham.] The procedure now established is not to apply retroactively to sentences heretofore imposed. 98 U.S. App. D.C. at 294, 235 F.2d at 521 (emphasis added).

See Griffin v. Illinois, 351 U.S. 12, 25-26 (1956) (concurring opinion of Mr. Justice Frankfurter); Warring v. Colpoys, 74 App. D.C. 303, 122 F.2d 642, cert. denied, 314 U.S. 678 (1941); cf. Great Northern Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932).[3] And see Gaitan v. United States, 317 F.2d 494 (10th Cir. 1963), commenting on Elkins v. United States, 364 U.S. 206 (1960).

Both the trial judge and appellant's counsel below were in agreement (Tr. 223-226) that the law as it stood at the time of trial did not render appellant's statements inadmissible.[4] At oral argument appellee

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3/ Compare Farnsworth v. United States, 98 U.S. App. D.C. 59, 232 F.2d 59 (1956), wherein the Government, relying on Durham, had argued that the decision in Johnson v. Zerbst, 304 U.S. 458 (1938), should not be retroactively applied. This Court in rejecting that argument distinguished Johnson on the ground that the language in the Johnson opinion indicated that the Supreme Court there "was simply enforcing a constitutional right which courts always should have recognized." 98 U.S. App. D.C. at 64, 232 F.2d at 64. Durham, by contrast, has no such constitutional foundation--nor has Ricks.

4/ THE COURT: I take it you are raising the point that the police may not interrogate him until he has counsel.

MR. OCHIPINTI: That is correct.

THE COURT: Have you any authority for that?

MR. OCHIPINTI: No. . . . (Tr. 223)

* * * * * *

THE COURT: I am afraid you are advancing a theory that may some day be the law, but is not now the law.

MR. OCHIPINTI: That is true.

THE COURT: And therefore your objection may be noted, and the objection will be overruled. (Tr. 225)

urged that a new rule of law, established in June 1964 by this Court in the exercise of its local supervisory power, should not reach ten months into the past to invalidate a ruling which was concededly correct when it was made in August 1963. Appellee adheres to that position and maintains that the new Ricks rule should not be applied retroactively.

Respectfully submitted,

/s/ DAVID C. ACHESON,
DAVID C. ACHESON,
United States Attorney.

/s/ FRANK Q. NEBEKER,
FRANK Q. NEBEKER,
Assistant United States Attorney.

/s/ JOHN A. TERRY,
JOHN A. TERRY,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Memorandum has been mailed to attorneys for the appellants, Henry T. Rathbun, Esq., 900 17th Street, N.W., Washington, D. C. 20006, and Jack Marshall Stark, Esq., 1100 17th Street, N.W., 20036, this 6th day of July, 1964.

/s/ JOHN A. TERRY,
JOHN A. TERRY,
Assistant United States Attorney.

EXHIBIT TO SUPPLEMENTAL MEMORANDUM

May 7, 1963 12:55

1. Tommie A. Johnson
N/M/18yrs
2. Leon Stewart
N/M/30yrs

D9 - 188

(Defts. and Offs.
arr at 11:03 a.m.)

Not handled any way

Co 5/28 req of each def
to obtain counsel
$3000 Bond ~~Each~~
Ea T.C.

no funds

May 28, 1963

AUSA Perry

GJ date is 6/3
Def attempts advise
counsel not avail

Ea req a hearing now
over

talked about Rights
legal aid
asked purpose of them
then said wanted hear now without counsel

Probable Cause Shown as to Each Def
Ea Held G. Jury
Ea $3000

Ea T.C

Det Chas C Sanders
Rob Sqd MPDC

5/6/03

in this robbery
arrested on lookout
on/descrip furn by
compl
taken to Rob Sqd
Stewart's prints on
whiskey bottle at
scene

reported that 11 pm on 5/6
at House of [illegible]
3736 10th NE
[illegible] Knew
[illegible] + [illegible]
Fred Gay [illegible]
forced him into rear
beaten
took 76.00 from
his person
a gold [illegible]
and a [illegible]
[illegible] 5 [illegible] 3 [illegible]

arrested
[illegible] woman

[illegible] later
8 [illegible]
no [illegible]

in robbery
[illegible]
photo [illegible]
[illegible]
found [illegible] 5th

[illegible] admitted
being there
denied facing
away
admit [illegible]
[illegible]

[illegible]
[illegible]
[illegible]
[illegible]

Cross –
by ~~Johnson~~ each

inv shoes
3rd party not involved

Mr R said he was mistaken
about a 3rd man

no statement about being
tricked

~~R~~
~~Said~~ at 1st he was going
to have relations
changed his mind
they beat him + robbed

orig report
showed showed he took them
in

[FIRST PAGE]

May 7, 1963

1. Tommie A. Johnson
N/M/18yrs
2. Leon Stewart
N/M/30yrs

D9 - 188
[Docket 9, Case 188]

(Defts. and Offs.
arr[ived] at 11:03 a.m.)
12:55
Not reached
very busy

C [continued until] 5/28 [at] req[uest] of each def
to obtain consult [sic][to obtain and consult with counsel]
T $3000 Bond each

No funds

Ea T.C.
[temporary commitment
as to each]

May 28, 1863

AUSA Terry

G J [grand jury] date
is 6/5
Det. Blancato advises
compl[ainant] not avail[able]

Ea[ch] req[uested] a hearing now
over

Probable Cause Shown as to Each Def

Ea[ch] Held [for] G[rand] Jury

Ea[ch] $3000 [bond]

[LEFT MARGIN:]

Talked about Dwyers [attorneys named Dwyer?]
Legal Aid
then asked purpose of hearing
then said wanted hear[ing] now
without counsel

Ea F.C.
[final commitment
as to each]

[SECOND PAGE]

Det. Chas C. Samen
Rob Sqd [Robbery Squad] MPDC

inv[estigated] this robbery 5/6/63
arrested on lookout
on descrip[tion] furn[ished] by compl[ainant]
taken to Rob Sqd [Robbery Squad]
Stewart's prints on whiskey bottle at scene

reported that 11:30 p.m. on 5/6
at House of Wines, 3736 10th N.E.
heard knock
2 n/f & n/m [two Negro females and a Negro male]
forced way into [sic]
forced him into rear
beaten
[illegible] took 76.00 from his person include [including]
a gold certif[icate]
and a H[ouse] of W[ines] ball pt pen
they handled a 5th & 3 glasses

[LEFT MARGIN:]

inv[estigation] later showed
no 3rd [person]
arrested
dressed as women

in rob sqd [Robbery Squad] office
prints compared
D[efendant] Stewart
found on 5th
both admitted being there
denied forcing way [inside]
admit hitting
deny tak[ing]
20 [dollar] gold certif[icate]
recovered from def[endant] Johnson
later
C[omplainant] identified both

[THIRD PAGE]

Cross [examination]
by ~~Johnson~~ each

inv[estigation] shows
3rd party not involved

Mr. R[osenberg] said he was mistaken
about a 3rd man

no statement about being tricked

R[osenberg] said at 1st he was going to have relations
changed his mind
they beat him & robbed [him]

orig[inal] report
inv[estigation] showed he took them in